Section 428 of Division E of the Consolidated Appropriations Act of 2019, "Policies Relating to Biomass Energy," Created Permanent Substantive Law

Section 428 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2019, which is Division E of Public Law 116-6, the Consolidated Appropriations Act, 2019, contains lasting directives to the Environmental Protection Agency concerning forest bioenergy. Section 428, titled "Policies Relating to Biomass Energy," directs the Administrator of EPA and the Secretaries of Agriculture and Energy to take a number of actions to "support the key role that forests in the United States can play in addressing the energy needs of the United States."

Although contained in an omnibus appropriations bill, section 428 is intended to, and does, effect a permanent policy change that reflects the carbon neutrality of forest biomass. EPA is bound by the mandates of section 428, and it will remain so even if no similar provision is included in future appropriations acts, because the language and nature of section 428 make clear that Congress intended the provision to be permanent legislation.

A provision of an appropriations act can create new or revised substantive law, as long as it does so clearly. See *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992); *United States v. Will*, 449 U.S. 200, 221-24 (1980). Indeed, appropriations acts can be "just as effective a way to legislate as are ordinary bills relating to a particular subject." *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973); see also *United States v. Dickerson*, 310 U.S. 554, 555 (1940); *Washington Metro. Area Transit Authority v. Beynum*, 145 F.3d 371, 373 (D.C. Cir. 1998) (that a change in a statute's substantive provisions "occurred in appropriations legislation is of no moment"). The appropriations act provision can "replace the legal standards" for agency actions. *Seattle Audubon Soc.*, 503 U.S. at 437.[1] A provision of an appropriations act can have the effect of altering implementation of an existing statute without being labeled as an amendment to that statute. See *Beynum*, 145 F.3d at 373. In fact, to the extent that an appropriations act provision contains a directive that clearly conflicts with a requirement of pre-existing law, the appropriations act provision will be interpreted as superseding provisions of the pre-existing law. *The Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 338-40 (4th Cir. 2007) (interpreting as controlling an appropriation act directive that the

[1] In *Seattle Audubon Society*, the Court concluded that an appropriations act provision substituted certain "compromise" requirements for timber management plans for 13 national forests in the Northwest related to protection of the endangered northern spotted owl in lieu of otherwise applicable requirements under the Migratory Bird Treaty Act and four other environmental and land-use statutes. Id. at 437-39. The Court found no distinction between Congress adopting the new criteria for decisions concerning those timber management plans in an appropriations act versus in legislation amending the MBTA and other statutes. Id. at 439-40.

Patent and Trademark Office not use appropriated funds to register or take other action under the Trademark Act of 1946 with respect to a specific trademark).

Although there is a strong presumption that the new substantive law only lasts until the end of the fiscal year for which the appropriations bill was enacted, an appropriations act can create permanent substantive law. See, e.g., *Bldg. & Constr. Trades Dept., AFL-CIO v. Martin*, 961 F.2d 269, 274 (D.C. Cir. 1992); *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224-25 (1st Cir. 2003); *Will*, 449 U.S. at 222. Whether a provision of an appropriations statute constitutes permanent substantive law is a question of legislative intent, resolved like any other question of statutory interpretation. See *Will*, 449 U.S. at 222; *Dickerson*, 310 U.S. at 554-55. Legislative intent to create permanent substantive law can be found if either "the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent." U.S. Govt. Accountability Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, Ch. 2 (4th ed. 2016) (the "GAO Red Book") at p. 2-86[2]; see also, e.g., *Atlantic Fish Spotters*, 321 F.3d at 224. A provision of an appropriations act that creates new substantive law need not be related to any aspect of funding. See *Pontarelli v. US Dept. of the Treasury*, 285 F.3d 216, 223 n.15 (3d Cir. 2002) (*en banc*) ("we know of no instance where the Supreme Court said that there is a distinction…between changing a substantive law by refusing to fund its implementation and doing so by including in an appropriations act legislation unrelated to funding.")

Traditional tools of statutory interpretation strongly support the conclusion that section 428 was intended to create permanent substantive law furthering use of forest bioenergy and recognizing the carbon-neutrality benefits of forest biomass as an energy source. Numerous factors support the conclusion that section 428 was intended as permanent law, including the following:

- Forward-Looking Language:
    - In considering whether Congress intended a provision of an appropriations act establishing new substantive law to have effect beyond the end of the fiscal year for which the appropriations act provided funding, courts look to whether the provision's "language clearly indicates that it is intended to be permanent." *Martin*, 961 F.2d at 274. Although the GAO Red Book emphasizes the presence or absence of certain "words of futurity," such as the word "hereafter," in determining whether a provision in an appropriations act is intended to create permanent law, it also discusses other potential words of futurity and does not indicate that any particular words are required.[3] See also, e.g., *Minis v. United States*, 40 U.S. 423,

[2] Courts have recognized that the GAO Red Book provides significant guidance when considering the effect of appropriations language. *Star-Glo Associates, LP v. United States*, 414 F.3d 1349, 1354 (Fed. Cir. 2005).

[3] Id. at pp. 2-86 to 2-89. In fact, the Red Book makes clear that an intent to create permanent law may be found without reference to any particular language: "A provision contained in an

447 (1841) (looking at "the natural meaning of the words, and the order in which they stand" when assessing whether a provision of an appropriations act made a permanent change in the law). Since the issue is one of statutory interpretation, the language of any general provision of an appropriations statute must be evaluated on a case-by-case basis.

- In this case, the language of section 428 is filled with words and phrases applicable to ongoing, future actions. Section 428 contains multiple future-looking mandates, including directing three cabinet secretaries (DOE, USDA, and EPA) to develop consistent biomass policies – policies which would be implemented through processes that would extend beyond the end of the fiscal year, such as the development of a decision-making record, the development of rules, interagency review of the rules, and public notice and comment. (Both the 2017 and the 2018 omnibus appropriations bills were enacted with about six months left before the end of the fiscal year, and the 2019 omnibus appropriations bill was enacted with less than eight months left.) That prospective language indicates Congressional intention that the provision survive past the end of the fiscal year. See, e.g., GAO Red Book p. 2-87 ("an appropriations provision requiring an agency action 'not later than one year' after enactment of the appropriations act, which would occur after the end of the fiscal year, is permanent because that prospective language indicates an intention that the provision survive past the end of the fiscal year.").[4]
- Section 428 includes additional future-looking requirements to develop policies to "encourage private investment throughout the forest biomass supply chain," to "encourage forest management to improve forest health," and to "recognize State initiatives to produce and use forest biomass." Those policies would, by their nature, evolve over time, and certainly the actions and initiatives the policies are to encourage would take place long beyond the end of the fiscal year. The forward-looking effect of those directives indicates Congress' intention that section 428 be permanent law.

- Phrasing as Positive Directive:

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annual appropriation act is not to be construed to be permanent legislation unless the language used therein *or* the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity *or if* the provision is of a general character bearing no relation to the object of the appropriation." GAO Red Book p. 2-86 (emphasis added).

[4] Perhaps not surprisingly, there is little if any judicial precedent responding to a party's assertion that a provision of an appropriations act directing an agency to adopt and implement new policies affecting regulation going-forward was nevertheless intended not to apply beyond the fiscal year for which the act provided funding.

- According to the GAO Red Book: “The phrasing of a provision as positive authorization rather than a restriction on the use of an appropriation is an indication of permanence….” Id. at p. 2-91.
- Section 428 is phrased as an affirmative directive to the heads of EPA, DOE, and USDA, rather than a restriction on the use of an appropriation, which further indicates its permanence.
- Section 428 is of a general character (requiring the development of clear and consistent policies reflecting the carbon neutrality of forest biomass), rather than something related to a specific appropriation or to a particular activity for which the appropriations act provides funding.
- Section 428 also has no limiting language, such as any connection to the availability of funds or actions to be taken within the fiscal year.

- Relationship to the Rest of the Appropriations Act:
  - In assessing whether a provision of an appropriations act was intended to create permanent substantive law, courts have looked at how the particular provision relates, if at all, to the rest of the appropriations act. See, e.g., *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144-45 (2d Cir. 2002); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978). The GAO Red Book notes that a provision may be considered independent and therefore permanent if it “is of a general character bearing no relation to the object of the appropriation,” id. at p. 2-86, or “bears no direct relationship to the appropriation act in which it appears,” id. at p. 2-90.
  - The policy direction Congress adopted in section 428 – for DOE, USDA and EPA to work together to develop consistent policies that reflect the carbon neutrality of biomass – is sufficiently unrelated to the rest of the appropriations act to be a strong indication of permanence. Section 428 is not expressed as a limitation on or direction for the expenditure of any particular appropriated funds, or for expenditure of funds generally. Nor are section 428’s directives predicated on the availability of funds. In contrast, other provisions of Division E of the Consolidated Appropriations Act of 2019 are explicitly expressed in terms of expenditure of appropriated funds. For example, section 431 states: “None of the funds made available in this Act may be used to require a permit for the discharge of dredged or fill material under” the Clean Water Act for certain identified activities. Section 417 provides that “none of the funds made available in this or any other Act may be used to implement any provision in a rule, if that provision requires mandatory reporting of greenhouse gas emissions from manure management systems.”
  - Section 428 is not tied to any other provisions of the 2019 omnibus appropriations act by its terms or even by its location in the statute (amid a variety of miscellaneous provisions, flanked by a provision extending the sunset date for directives to the Secretary of the Interior and the Secretary

of Agriculture concerning recreation fees on lands they administer, and one appropriating additional funds for EPA hazardous waste site cleanups and for state drinking water and waste treatment plant construction programs).

- It is noteworthy that section 428, which mandates consistent biomass policy changes coordinated among DOE, USDA and EPA, is in Division E of the Consolidated Appropriations Act of 2019, which makes appropriations for EPA and for USDA's Forest Service, but does not make appropriations for other agencies and programs in USDA (for which appropriations are made under Division B) or for DOE (for which appropriations were made in a separate appropriations act, Division A of Pub. L. 115-244). The fact that section 428's directives clearly would be implemented in part by agencies not subject to funding made available by Division E further demonstrates that Congress intended section 428 to be permanent legislation not tied to any specific appropriation.

- Legislative History:
  - The legislative history of a provision of an appropriations act can be helpful in determining whether that provision was intended to enact substantive law or merely direct use of appropriated funds, and whether a change in substantive law made in an appropriations act was intended to last beyond the applicable fiscal year. See, e.g., *Pontarelli*, 285 F.3d at 220-24, 226-30; see also *Will*, 449 U.S. 222-31.
  - Language identical to section 428 originally was drafted as permanent legislation amending the bipartisan North American Energy and Infrastructure Act of 2016 bill, S. 2012, and it was adopted by voice vote on the Senate floor on February 2, 2016. The substance of that policy change (a permanent policy change to resolve an issue the agencies had failed to resolve for seven years) and the consensus behind it were the motivating factors for its inclusion in the Consolidated Appropriations Act. Congress never enacted the 2016 Senate energy bill, despite its passage by a wide margin in the Senate.[5] But during the FY 2017 Interior, Environment, and Related Agencies appropriations process, after both houses had included a biomass energy provision, the conference committee substituted the 2016 Senate energy bill forest bioenergy provision without explanation. That language was enacted as section 428 of Division G of the 2017 omnibus appropriations act and then reenacted as section 431 of Division G of the 2018 omnibus appropriations act and section 428 of Division E of the 2019 omnibus appropriations act.

[5] Congress' failure to enact a preceding substantive bill with a similar provision does not indicate that Congress intended an appropriations bill provision to have different or more-limited effect. See *Pontarelli*, 285 F.3d at 223 (rejecting a panel opinion that Congress' failure to enact a bill that was "the ancestor of the appropriations ban" indicated that the appropriations ban was not intended to change substantive law).

- Floor statements by the sponsor of the bioenergy amendment to the 2016 Senate energy bill, Senator Collins, and two of the co-sponsors, Senators Klobuchar and King, clearly indicate that the language of that amendment – subsequently inserted in the appropriations bills – was meant to effect a permanent change in government policy to recognize the carbon neutrality of using forest biomass for energy going forward. For example, Senator Collins explained: "The fact is that biomass energy is a sustainable, responsible, renewable, and economically significant source....Our amendment supports this carbon-neutral energy source as *an essential part of our Nation's energy future*." 162 Cong. Rec. S551 (Feb. 3, 2016) (emphasis added). "A literature review of forest carbon science…confirms that 'wood products and energy resources derived from forests have the potential to play an important *and ongoing* role in mitigating greenhouse gas (GHG) emissions.'…We should not have Federal agencies with inconsistent policies when it comes to such an important issue." Id. (emphasis added). Senator Klobuchar stated: "Without clear policies that recognize the carbon benefits – and I will say that again: the carbon benefits – of forest biomass, private investment throughout the biomass supply chain *will dry up* and the positive momentum we have built toward a more renewable energy future *will be lost*." Id. at S551 (emphasis added). Cf. *Will*, 449 U.S. at 223-24 (floor statements in support of appropriations provision confirm the Court's analysis that the language of the provision indicates it was intended to make a permanent change in existing law).

- Interpretation as Temporary Would Render Section 428 Ineffectual.
  - Finally, construing section 428 as temporary rather than permanent would render it ineffectual. As explained above, the mandates and policy direction set forth in section 428 could not have been accomplished by the end of the fiscal year. Moreover, the outcomes that section 428 states that it aims to achieve – encouraging private investment in the forest biomass supply chain, encouraging forest management to improve forest health, promoting state initiatives to produce and use forest biomass – manifestly would play out over many years, and therefore the policies and actions that section 428 directs EPA, DOE, and USDA to take would have to last indefinitely rather than dissolve a few months after section 428 was enacted.
  - One of the most basic canons of statutory construction is that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant…." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted). Concluding that section 428's directives were meant to expire at the end of the fiscal year would mean that Congress enacted a provision that the agencies could not feasibly carry out and that would not achieve any of its stated goals. That interpretation clearly would violate this fundamental principle of statutory

construction. See *Nat. Treasury Emp. Union v. Devine*, 733 F.2d 114, 117-19 (D.C. Cir. 1984) (rejecting an interpretation of a general provision of an appropriations act that would make the provision ineffective to accomplish the clear Congressional objective); *Pontarelli*, 285 F.3d at 230-31 (rejecting an interpretation of appropriations language that would have the effect of making the process of reviewing felons' firearms privileges less reliable, when the appropriations act provision was motivated by concerns that some dangerous felons had been regaining firearms privileges); GAO Red Book at 2-91 ("a provision may be construed as permanent if construing it as temporary would render the provision meaningless or produce an absurd result").